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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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B5

FILE: [REDACTED]
WAC 05 245 53110

Office: CALIFORNIA SERVICE CENTER

Date:

MAY 04 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maia Johnson

2 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the alien employment certification, the petitioner provides information technology consulting and import/export services. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and audited financial statements. As will be discussed in more detail below, the petitioner has not established why the new financial statements are more reliable than the tax returns submitted initially. Thus, the petitioner has not overcome the director's basis for denial.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 13, 2002. The proffered wage as stated on the Form ETA 750 is \$82,600 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner did not list an establishment date but claimed a gross annual income of \$500,000, a net income of \$100,000 and 10 employees. In support of the petition, the petitioner submitted its 2002 and 2003 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 25, 2006, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R.

§ 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its corporate tax return for 2004 and compiled financial statements for 2003, 2004 and 2005. The petitioner also submitted quarterly reports reflecting no wages paid to the beneficiary. While the petitioner indicated on the Form I-140 petition that the beneficiary's position was not a new position, the petitioner has never indicated whom the beneficiary would be replacing.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 1, 2006, denied the petition.

On appeal, counsel asserts that the petitioner's type of business, consulting services, gives rise to large accounts receivable and that the petitioner's net current assets are sufficient to establish its ability to pay the proffered wage. The petitioner submits audited financial statements for 2002 through 2004.

The tax returns and financial statements submitted throughout the proceeding reflect the following information for the following years:

2002:

	1120	Audited Statement
Gross Income	\$342,646	\$411,750
Net income	\$11,001	\$77,005
Current Assets	(\$12,566)	\$251,879
Current Liabilities	\$34,767	\$16,291
Net current assets	(\$47,333)	\$235,588

2003:

	1120	Compiled Statement	Audited Statement
Gross Income	\$487,771	\$589,271	\$589,271
Net income	\$5,659	\$104,030	\$102,060
Current Assets	\$3,202	\$209,974	\$310,389
Current Liabilities	\$100,893	\$100,893	\$54,280
Net current assets	(\$97,691)	\$109,081	\$256,109

2004

	1120	Compiled Statement	Audited Statement
Gross Income	\$478,616	\$577,625	\$601,625
Net income	\$6,921	\$105,698	\$127,483
Current Assets	\$20,335	\$310,035	\$448,316
Current Liabilities	\$94,204	\$94,204	\$36,704
Net current assets	(\$73,869)	\$215,831	\$411,612

2005

	Compiled Statement
Gross Income	\$483,844
Net income	\$174,851
Current Assets	\$295,024
Current Liabilities	\$11,620
Net current assets	\$283,404

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage at any time.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The unaudited financial statements that the petitioner submitted in response to the request for additional evidence are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the director did not err in failing to consider those statements.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002 through 2005. According to the tax returns, in 2002 through 2004, the petitioner shows a net income of \$11,000 or less, negative net current assets or net current assets of only \$47,333 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The record before the director did not demonstrate that any other funds were available to pay the proffered wage. Thus, the director's decision was legally and factually sound.

On appeal, counsel states:

We would like to bring to your attention that the petitioner has the unique distinction of healthy gross sales revenue growth year-on-year with zero external debt under the most difficult business conditions. Being a computer services company defined by

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Federal Law under Business Activity Code No. [REDACTED], large accounts receivable that have accrued but not materialized are normal for consulting services rendered. Hence, tax returns may reflect lower net incomes than are calculated on cash basis. However, the difference between the current assets and current liabilities are significantly high to undoubtedly satisfy this query.

Thus, the petitioner's position appears to be that the financial statements contain different information because they were prepared using the accrual accounting method while the tax returns were prepared using the cash basis method. The petitioner's choice of accounting methods has attributed income to various years as appropriate, and those amounts may not be shifted to other years as convenient to the petitioner's present purpose. Changing from the cash method to the accrual method may change the year-to-year distribution of the petitioner's current assets, but the petitioner has not demonstrated how changing from cash to accrual method would make available hundreds of thousands of dollars in net income over four consecutive years that would otherwise never have appeared on the tax return in any of those years. In fact, if the net incomes reported on the compiled and audited statements are accurate, they suggest that the petitioner has seriously underreported its income to the IRS. The change from cash basis to accrual also fails to explain the decrease in current liabilities shown in the audited statements.

Our position is consistent with the business reference available at www.referenceforbusiness.com, which provides that while switching accounting methods generally results in adjustments to taxable income, "changing accounting methods does not permanently change the business' long-term taxable income, but only changes the way that income is recognized over time."

The petitioner has presented two vastly different pictures of its current assets and net income, with no documentation to show why one version is more credible than the other. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

The petitioner has not shown that the audited or compiled statements are more credible than the original tax returns. The petitioner has failed to submit credible evidence sufficient to demonstrate that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.